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Supreme Court, U.S.
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No. 96-665

In The

Supreme Court of the United States

October Term, 1996

ENERGY TRANSPORTATION CORPORATION,

Petitioner,

vs.

JIMMIE GARNER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The proceeding below asserted claims for damages by a Jones Act seaman for injuries occurring in two separate, disabling accidents. Petitioner submitted evidence that it claimed impeached the evidence presented by Respondent. Petitioner's contentions were rejected by the jury. After the jury verdict, the district court considered, but denied, Petitioner's motion for a new trial, which the Court of Appeals for the Second Circuit affirmed. Essentially, the question presented by the petition here is:

Did Petitioner receive a fair trial?

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Appendix A — Excerpted Jury Charge 1a

STATEMENT OF THE CASE

In the trial of this case below, Respondent, Jimmie Garner, presented claims for damages for personal injuries suffered on both January 17 and March 13, 1991. The injuries occurred in accidents that happened to him while he was working as a seaman aboard the vessel LNG LEO, a tankship owned and operated by Petitioner, Energy Transportation Corporation ("ETC").

At the time of trial, Respondent was 54 years old. He had only a Ninth grade education, and spent most of his life as a seaman.

In 1984, Mr. Garner was hired by ETC, which operated eight similar tank ships, including the LNG LEO, which carried liquified natural gas from ports in Indonesia to ports in Japan. (A314-317).[1] In April 1990, Mr. Garner was assigned to work as permanent bosun upon the LNG LEO. (A315). His first tour of duty lasted through August 1990, during which time he worked under the command of Captain Norman Smith. (A422).

Upon joining the ship, Mr. Garner observed that only the very forward part of the ship's main deck had upon it functional non-skid deck paint. (A324). Part of his assigned duties during the voyage included supervising the painting of much of the

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1. With limited exceptions, citations herein are either to the appendix annexed to the petition (designated as PA, etc.) or to the Joint Appendix and Supplemental Appendix submitted to the Second Circuit on the hearing of the appeal below (which bear the reference "A __" or "SA __"). The exceptions, as discussed in the text at footnote 2, *infra*, are to portions of the district court's charge which were omitted from the petition. Since the court's charge on witness credibility is central to the arguments made in support of the petition, and the omitted portions substantially negate Petitioner's complaints, the entire charge by the court concerning witness credibility is included in an appendix hereto, and is cited to as "RA __", *etc.*

rest of the main deck. In performing his duties, he discovered that the vessel had no abrasive additive for the deck paint, to give it a "non-skid" character. As a result, the paint was applied to the decks without abrasive additive. (A323-326, A421-424).

After Mr. Garner's first tour of duty ended in August 1990, the company scheduled him to return to the vessel around New Year's Day of 1991. In order to qualify to return to the job, Mr. Garner was required to undergo a pre-sign on physical exam which he successfully completed on December 23, 1990. (A495-496).

On December 27, 1990, Respondent had an accident at home where he mis-stepped from a porch and fell about one foot to the ground. In so doing, he slightly twisted his right knee. He suffered minor discomfort and swelling, which he felt were so insignificant that he sought no medical attention. (A342-344). His wife, Connie Garner, and his minister, the Reverend Billy Walker, both of whom observed him between the date of the incident on the porch and the date when he travelled to the ship, testified that by December 29, he had no noticeable disability, and did not complain of problems with his leg. (Connie Garner Test., A895-902; Rev. Billy Walker Test., A 787-789).

He reported for his next tour of duty on January 4, 1991. Upon boarding the ship, he reported to the captain who directed him to assist a technician doing work on equipment at the bow. After doing so, he returned to the captain's office to sign the shipping articles, at which time he mentioned to the captain that his knee had some swelling, probably caused by the fall off the porch, and aggravated somewhat when he ran through the airport to catch the plane he flew to reach the ship. The captain told Garner to report this to the Chief Mate, Alan Barnes (sometimes referred hereinafter as "the Mate"). That evening, while on the serving line to get dinner, Garner told Barnes about his slightly

swollen knee. Mr. Garner asked Barnes for something to treat it. Barnes agreed to provide some medication. (A347-51).

On January 6, 1991, Barnes approached Mr. Garner and apologized for having forgotten to give the medication previously promised. He told Mr. Garner that he had left some ibuprofen on Garner's desk. (A352). By January 8, Mr. Garner testified, the swelling had resolved. (A355). Mr. Garner, without difficulty, during the next nine days performed much heavy physical labor. This was corroborated through the testimony of a co-worker, Joseph Morrison. (Morrison Test. A717-720; Garner Test. A356-359).

On January 17, 1991, while the ship was sailing towards Japan, Mr. Garner fell on the wet, slick deck of the vessel, severely injuring his knee. The immediate, excruciating pain he felt was as if he "broke his leg off". (A364-368). His slip and fall was caused by a combination of the wind pushing him, the deck being slippery from water, and a fine residue of oil, and the deck not having upon it functional non-skid paint. (A369). At trial, these facts were corroborated by independent evidence. For instance, Mr. Morrison testified that the deck where Garner fell was devoid of functional non-skid paint. Additionally, in a statement by Mr. Morrison dated March 14, 1991, admitted into evidence, he wrote that the deck paint was inadequately infused with non-skid additive. (A722-723; A1729-30). As to the oil on the deck, Chief Mate Barnes confirmed that the Nos. 1 and 2 winches, and the two anchor windlasses on the foredeck, not far from the accident site, all were experiencing oil leakage problems. (A827). The deck worklog, furthermore, recorded that the deck in the area where Mr. Garner fell was thoroughly cleaned and degreased two days after the accident. (A381-83, 385-88; Deck Work Log for November 19, 1991, exhibit at trial, A1568).

Early on January 18, the day after the accident, Mr. Garner went to the Mate's office to discuss the incident. The Mate said to Garner "well you finally made the medical log", and then had Garner sign a blank accident report, which the Mate said he would later complete. The typewritten report was later filled in by Mr. Barnes. (A375-379). At trial Mr. Garner reviewed for the jury the completed accident report. He testified that the typewritten report had inaccuracies and changes from what he had told the Mate. (A379-381). Alan Barnes, in his testimony, conceded that he made numerous errors in completing the report. (A208-209).

Later on January 18, after examining Mr. Garner's knee, the captain asked Garner to bypass seeing a doctor in Japan, their next port, because that doctor would probably send Garner home as not fit for duty. The captain said he knew the doctor in the next Indonesian port, however, and he could get that doctor to treat Garner without declaring him disabled, which meant that Mr. Garner could remain working aboard ship. (A389-390).

By January 22, the voyage to Japan ended. As part of his duties, Mr. Barnes prepared the vessel's medical log. He followed his custom and practice of typing entries into the ship's medical log at the end of the voyage based upon hand-written notes he had made during the voyage. (A220, 393). On January 22, before arriving in port, the crew gathered in the mess room to handle necessary paper work. Those who had received medical attention during the voyage, including Mr. Garner, were asked to sign the medical log. Mr. Garner reviewed the log and saw that the only entry pertaining to him for the time period of this voyage was next to the date January 6, 1991. The information typed therein stated the date the Mate had given him medication, and the various treatments he recalled he had received since the accident. Mr. Garner signed the entry, concluding that it summarized his medical treatment and conditions for the past three weeks. (A393-397). Although Mr. Barnes testified that

the entry for January 6 reflected only Mr. Garner's condition on that date, he had no persuasive explanation for why there was no entry for January 17, the date of Mr. Garner's reported accident. (A211-212). Thus, the jury had ample evidence to conclude that Mr. Garner told the truth about his belief that, when he signed the medical log, he considered it to be a summary, or "consolidation", of the past treatment he received.

On January 28 the ship returned to Bontang, Indonesia, where the captain took Mr. Garner to see the doctor. The doctor diagnosed Mr. Garner with a torn knee ligament. (A397-401). The captain requested Mr. Garner to continue working despite the injury, and Mr. Garner agreed. (A389-390). At trial, the captain and mate denied overlooking his ailment so that Mr. Garner could remain at work. Neither, however, effectively explained how, without their intervention, Mr. Garner could be found fit for duty while having a torn ligament unless they had intervened on his behalf.

Mr. Garner suffered a second accident in the early morning hours of March 13, 1991 when the ship was at sea heading from Japan to Indonesia, passing through the Straits of Singapore. At approximately 2:00 a.m., while returning from some duties on the vessel's bow, Mr. Garner slipped and fell again on the ship's main deck. This time he struck and fractured his elbow. (A403-405; ex. 9, SA169). The lack of non-skid paint on the deck, and dampness, salt and grease thereon, all contributed to this fall. (A406-07). The ship's safety meeting minutes for March 31, 1991, reveal that a discussion was held in which it was mentioned that some of the decks needed non-skid paint. This corroborated Respondent's contention that the non-skid paint on the decks was poor. (SA188).

After Mr. Garner reported his March 13 injury to the Mate, he went to his room and spent the evening in pain. (A409-412). Later that morning the Mate had him sign another accident report

form, which was only partially filled out, and which later was completed with omissions and inaccuracies which Mr. Garner never had the opportunity to correct. (A412-413). Garner was taken to a doctor that morning and was made not fit for duty. (A421, 429-430). He was flown home in a torturous, three-day flight, in agony from his fractured elbow and severely injured knee.

Upon arriving at his home in Gadsden, Alabama, Mr. Garner saw Dr. Dan Sparks, the attending orthopedist at Holy Name of Jesus Hospital emergency room in Gadsden. Both the emergency room notes and Dr. Sparks' office notes state that Mr. Garner reported that he had had two shipboard falls about 6 weeks apart — in one he hurt his elbow and the other his knee. (Ex. 47, SA17; Dr. Sparks notes SA179). Even though one note from David Bishop, Mr. Garner's physical therapist indicates that the condition for which he treated Mr. Garner's knee was existent from December 1990 (which was when Mr. Garner admittedly did suffer a slight knee injury when falling from a porch), Mr. Bishop, in a different statement affirms that the accident reported to him occurred on the ship. Mr. Bishop's note states that Mr. Garner reported that "this injury per my interview with the pt. as he stated at that time back in March 29, 1991 occurred January 17, 1991." (A 1667). This, of course, is consistent with both the emergency room record from Holy Name of Jesus Hospital for March 17, 1991, and Dr. Sparks's office notes, for March 18, in each of which is recorded that Mr. Garner reported he fell on the ship six weeks earlier injuring his knee. (SA171; SA179).

Several days after seeing Dr. Sparks in the emergency room, Mr. Garner was admitted to the hospital for arthroscopic knee surgery. During surgery, Dr. Sparks found moderate three compartment knee arthritis, chondromalacia of the patella, a medial meniscus tear, blood in the joint, a hematoma associated with a medial collateral ligament tear and an absent anterior cruciate ligament. (A 1655).

After discharge from the hospital he underwent physical therapy for both his knee and elbow. He worked intensely, and by the beginning of July, had obtained about 70% strength and close to normal flexion and extension of the knee. His elbow, however, took longer to respond, and during the treatment, slippage of the bone fragment occurred. (A433-435, 446; SA20-26).

As of July 1, 1991 he was told that he could return to work, but both his knee and elbow still had some pain, swelling and limited motion. Mr. Garner rejoined the ship in August 1991, and worked through February 1992, except for a short break while the ship was in a shipyard. By December 1991, Mr. Garner's knee again became very symptomatic. He took to staying in his room for longer periods of time from where he supervised his men. This did not sit well with the ship's captain, and in February, 1992, the Captain advised ETC that he did not want Mr. Garner to return under his command because his knee injury interfered with his ability to do his assigned work. (A447-451).

As a result, ETC transferred Mr. Garner to the LNG AQUARIUS, on which he shipped from August 1992 until February 1993. During this voyage Mr. Garner concluded that his career was nearing an end because his knee caused him constant pain. (A452, 456-459).

Mr. Garner's elbow, furthermore, was increasingly symptomatic. The joint lacked flexion and extension, was sore and painful to the touch, and had developed crepitus. It had developed traumatic arthritis at a rate that surprised Dr. Sparks. (SA33-34).

When Mr. Garner saw Dr. Sparks on April 6, 1993, Dr. Sparks found that Mr. Garner's knee had totally collapsed.

Additionally, Mr. Garner's elbow presented ever-increasingly severe symptoms. Since at least June 1992, he had neurological dysfunction caused by entrapment of the ulnar nerve where it crossed the site of the fracture and displaced bone. By March 1993, x-rays showed severe degeneration in the elbow. (A1002).

Dr. Sparks performed knee replacement surgery on Mr. Garner on October 5, 1993 at Gadsden Hospital. This operation involved removing the end of the thigh bone, the top of the leg bone and the back part of the kneecap and installing artificial parts. (SA104-106). Dr. Sparks attributed the accident of January 17, 1991 to be the most likely cause of the ligament and meniscal tears he found in Mr. Garner's knee, and not the December 27, 1990 incident, when Mr. Garner fell from the porch. Dr. Sparks conceded that Mr. Garner had a pre-existing moderate three compartment osteoarthritis and chondromalacia dating back to 1989, but he further testified that this condition was not the cause of the traumatic injuries for which he treated Mr. Garner, nor was it the cause for him needing knee replacement surgery as soon as 1993. He opined that the conditions caused by the fall on January 17, 1991 caused Respondent to need the knee replacement surgery. (A983-992).

Though there was ample evidence of causation between the accident on January 17, 1991 and the traumatically induced arthritis leading to joint replacement, Dr. Sparks testified that in light of the arthritis that pre-existed the accident, Mr. Garner would eventually have needed a knee joint replacement within 5-10 years of October 1993. (A 992). Petitioner conceded that the knee arthroplasty totally disabled Respondent from again working at sea.

Without question, the case was hotly contested on nearly every fact presented. The testimony presented by Petitioner's primary liability witnesses, Captain Norman Smith and Chief

Mate Alan Barnes about the factors which caused the fall, the slippery deck, was directly contradicted by Mr. Garner, and further, by the independent testimony of his shipmate, Joseph Morrison, who corroborated much of Mr. Garner's testimony. Additionally, portions of the testimony of the Mate, Alan Barnes, and much of the documentary evidence, such as the company's purchase orders, requisitions and delivery documents show that this ship had no non-skid additive for use in painting for over a one-year period before the January 1991 accident. (Barnes, A227-228; 824-826). Thus, the jury had ample, strong evidence that the decks of the ship were dangerous.

After deliberating, the jury found Petitioner liable to Respondent, and awarded him $1.1 million in damages for the injuries he suffered in the two accidents. The strong weight of the evidence upon which they based their verdict was in Respondent's favor. For instance, in awarding $682,000 for past and future pain and suffering, it based its decision on a large body of evidence presented to it through Respondent's testimony and that of his wife, his doctor and his pastor.

Concerning the suffering endured by Mr. Garner with respect to his knee, in the January 17, 1991 fall on ship, Mr. Garner tore the medial collateral ligament, the medial meniscus and possibly caused, and definitely aggravated, a torn anterior cruciate ligament. As a result of these injuries he hobbled around the ship for two months in pain. (A401).

Mr. Garner, on March 19, 1991, underwent surgery to repair several of these conditions, followed by painful physical therapy. (Sparks, SA22-26).

He returned to work, and completed two more tours of duty, as his knee joint deteriorated. Within about two years, his knee went from having only moderate degenerative arthritis to totally

collapsing from the effect of the traumatic arthritis precipitated by the accident. This caused him excruciating pain whenever he moved his leg. He described this pain once in a sad telephone conversation with his wife. He had called from overseas, she related, and was crying as he told her that the terrible pain he had "was like walking like bone rubbing on bone". (A1159-1160).

When he finally had the knee replacement surgery, he again underwent a painful period of physical therapy followed by home exercises. His primary continuing therapy is walking. (A1133-1134). The pain he felt after the surgery he described as follows: "the first two days I have never experienced the pain of death. If pain could kill you, I would have felt like dying." (A462).

Additionally, even though there was evidence that in 5-10 years he would have needed the surgery anyway, there was no evidence that Mr. Garner, absent the traumatic arthritis induced by this fall, would ever have experienced the type and extent of pain he endured as a result of this fall up to the time of surgery.

For 5-10 years longer than otherwise, Mr. Garner will have endured having a mechanical joint in his body, one that he described as feeling "artificial". (A464). The prosthesis implant has left him with restricted motion, occasional swelling, and soreness. (Dr. Sparks, A1135-36; Garner A462-464). Additionally, Mr. Garner has the large, disfiguring scars caused by the surgery.

Worse still, however, is the fact that for 5-10 years longer than otherwise, he had to give up being a seaman, a job he loved. He feels humiliated — less of a man because he can not be the provider to his wife and young son that he feels he is supposed to be, and he has been under intense emotional stress. (A479).

In its poor attempt to paint the jury as having been "impassioned" by its award of an "excessive" verdict (an argument rejected by the district court and the Second Circuit), it is curious how Petitioner fails to discuss Mr. Garner's past and continuing pain and disability related to the comminuted fracture of the radial head of his elbow, which has lead to severe degenerative arthritis and an entrapped ulnar nerve. That injury presently causes him difficulties more extensive than that which he endures from his knee. (A465-466; A1138).

The jury, which included a physician, was not unduly sympathetic to Mr. Garner. They appreciated the physiological and psychological trauma Mr. Garner suffered in having two limbs severely disabled. Their award was the product of a rational deliberation, which the Court should not disturb.

In affirming the judgment, and finding the award not to be excessive, the Second Circuit relied upon its prior decision in *Scala v. Moore McCormack Lines, Inc.*, 985 F.2d 680 (2d Cir. 1993). In *Scala,* a similar situation was presented to the court as was presented here. There the plaintiff had suffered multiple traumas, including a knee injury and chronic back pain. The court found the jury's award of $1,500,000 for pain and suffering excessive, but it stated that $750,000 would be reasonable and fair compensation.

After verdict, Petitioner moved pursuant to Federal Rules of Civil Procedure 50 and 59 to set aside the verdict, or in the alternative, to enter judgment notwithstanding the verdict because the weight of the evidence, Petitioner claimed, did not support the verdict. The district court denied those motions, and Petitioner appealed to the United States Circuit Court of Appeals for the Second Circuit.

On appeal, Petitioner argued that the verdict was excessive and against the weight of the evidence, and that the trial court

had made reversible errors based upon purported prejudicial statements and "testimony" the district court judge supposedly made to the jury. The Second Circuit rejected these contentions, finding that Respondent received a fair trial but lost. It affirmed the judgment in all respects.

Respondent sought rehearing with a suggestion for rehearing *en banc*. These requests were summarily denied.

REASONS FOR DENYING THE WRIT

I.

THE PETITIONER WAS NOT DENIED A FAIR TRIAL BY THE DISTRICT COURT'S COMMENTS TO THE JURY ABOUT WITNESS MEMORY VERSUS INTENTIONAL FABRICATION.

During the trial, it became evident that Petitioner's key witnesses, Captain Norman Smith and Chief Mate Alan Barnes did not tell the truth. The jury rejected their testimony, not because of the district court judge's trial conduct, but because their falsehoods were exposed. The district judge gave a neutral jury charge concerning Smith's, Barnes's and Respondent's, credibility. The judge stated that it was the jury's duty to determine credibility, and in so doing, he described a legally acceptable view about witness intentional falsification compared to mistaken memory. Among other comments, the court said:

> What I think of the facts or don't think of the facts is wholly immaterial, and I don't intend to give you any impression of what I think the facts are.

(S24a).

Concerning credibility, the court said:

> The reason I don't like (using the word credibility) is it suggests if a witness is not credible, he or she is lying. Lying is sitting on the witness stand and saying something that the witness knows not to be true at the time he or she is saying it. Now, I don't have any idea whether or not that happened in this case. That is something for you to judge. It just has been my experience that, usually, that doesn't happen. Usually, the witness has convinced him or herself of what he or she is saying by the time he or she gets on the witness stand. That may be wrong, they may misremember things. That is for you to determine . . .

(S24a-25a).

Petitioner fails to recount that the court, again discussing witness credibility, also gave a "*falsus in uno*" charge. The court explained:

> Now, there is a charge called faultus (sic) in uno . . . It means, if you are false in one thing you can be deemed to be false in everything. That means if a witness sitting on that stand has testified to something you believe he has testified falsely, and it was to an important matter, you are entitled, if you want, to disregard that witness's testimony in its entirety. . . .

(RA4-5).[2]

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2. Because some of the judge's charge relating to witness credibility (Cont'd)

The court then addressed Petitioner's major concern in this case, the supposed "inconsistent statements" Petitioner claims Mr. Garner made. The court gave the following instructions which, significantly, Petitioner fails to recount in its petition:

> Then there is a general rule about prior inconsistent statements. If a witness testifies to a fact and then is shown to have made a prior statement inconsistent with that fact, naturally you take into account the inconsistency in evaluating the witness's entire testimony. If you find that the inconsistency was deliberate and had a motive, then, naturally, you take that into account very seriously in considering the rest of the witness's testimony. If you decide, though, it is just a mistake or seems to the witness an unimportant matter, why then you evaluate it accordingly.

(RA5-6)

These portions of the charge which were not included in the petition, or the appendix annexed thereto, explained to the jury that if it found that a witness lied on any point, they could reject all of the witness's testimony. It also highlighted the impact prior inconsistent statements could have upon a witness's credibility.

When the statement about which Petitioner complains is read in context with the whole charge, it is clear that the judge

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(Cont'd)
was not included in the petition, those portions are reproduced in the appendix hereto. Citations to the appendix are designated as "RA __"

gave a neutral and accurate charge to the jury, and which was not prejudicial.

Of significance, Petitioner at trial did not object to the court's jury charge, thus, it did not preserve the issue on appeal.

Additionally, the court's comments about witness mis-recollection is a correct statement of the dynamics of witness testimony. Many courts recognize that a witness's recollections will be subject to many factors. For instance, in *Alamo v. Del Rosario,* 98 F.2d 328, 331 (D.C. Cir. 1938), the D.C. Circuit stated:

> The plaintiff in most personal injury cases was subjected, just before he was hurt, to excitement enough to explain mistakes of observation and memory . . . [T]he law recognizes the fact that parties, as well as other witnesses, may honestly mistake the truth, and requires juries to find the facts by weighing all the testimony whatever may be its source.

Alamo, 98 F.2d at 331.

In this case, the challenged statements by the district court, taken in conjunction with the district court's charge on interested witnesses, would have benefitted Petitioner more than Respondent, since, as the court noted, Mr. Garner and his wife were the most interested witnesses in the outcome of the case.

The district court told the jury:

> Obviously, to what extent does the witness have an interest in the outcome? Well, in this

> case, just about everybody who testified had an interest in the outcome, or could be presumed or found by you to have an interest in the outcome. Certainly, the plaintiff and his wife have an obvious interest: They want to you (sic) have give them money: when they get it, they will spend it. I can't think of a better interest in the outcome . . .

(S25a).

Finally, the court's statement that it had no opinion about the credibility of any witness, and advising it that it was their function to decide that issue, cured any prior infirmity in the charge. *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1290 (2d Cir.), *cert. denied,* 111 S. Ct. 297 (1990).

II.

THE DISTRICT COURT DID NOT IMPROPERLY QUESTION MR. GARNER ABOUT HIS TESTIMONY.

Petitioner complains only about one, single interjection by the district court that Petitioner contends so affected the jury that Petitioner received an unfair trial. The facts belie the contention.

The incident in issue occurred when the trial judge sought clarification from Mr. Garner about whether he understood defense counsel's accusation that Mr. Garner lied when he signed the affidavit which contained purported inconsistencies.

What Petitioner fails to do is put the complained-about incident in context. Whether prejudice occurs during a trial must be judged by reviewing the trial as a whole. Mr. Garner's trial

consumed nine full trial days. The trial transcript consists of more than 1200 pages. Mr. Garner's testimony alone consumes over 400 pages of transcript, and took almost two full days to conclude.

The objected-to comments, in contrast, consist of four questions and a short statement by the court, taking up less than one page of the transcript. This event occurred at least six hours into the cross-examination of Mr. Garner. The sequence of events was as follows. Mr. Garner had acknowledged that his affidavit contained factual errors, and Petitioner's counsel then asked whether the affidavit was truthful. Mr. Garner said "no". The court, hearing the testimony and observing the demeanor of Mr. Garner, asked if Mr. Garner had meant to say that he intended to falsify the statement in the affidavit, and was admitting he lied when he signed it. It was evident that Petitioner's counsel was peppering him with leading questions, putting words into his mouth, the import of which Mr. Garner may not have appreciated. The relevant exchange is as follows:

> Q. Now, did you say the second paragraph of your affidavit of October 14th, 1992, that you mentioned to the chief made (sic) — and I will read it word for word — on 1/6/91, I mentioned to the chief mate that I had injured my knee at home, and my knee was swollen." Now, was that statement which you made in October 1992 under oath accurate?
>
> A. No, sir.
>
> Q. Was it truthful?
>
> A. No, sir.

> THE COURT: What do you mean by, "No, sir"?
>
> THE WITNESS: There is an explanation of that.
>
> THE COURT: "Truthful" means that you knew it was not true when you wrote. Is that what you intended to say?
>
> THE WITNESS: No, sir.
>
> THE COURT: It was mistaken?
>
> THE WITNESS: It was mistaken.
>
> THE COURT: So you did not realize what truthful meant when you answered that question?
>
> THE WITNESS: I am (sic) confused about that.

(S20a-21a)

To make sure that there was no misunderstanding as to what the court's purpose was in asking its questions of Mr. Garner, the court told the jury:

> Incidentally, understand that when I interrupt to question the witness, there is no importance to that, and I have no views one way or the other. It was a word he didn't understand.

(S21a).

The topic on which he was being cross-examined was whether Mr. Garner reported his accident at home by January 6 to the *Mate,* as the affidavit stated, or the *Captain,* as his trial testimony revealed. Clearly, it ultimately is irrelevant which senior officer it was to whom he reported the incident. The important thing was that Mr. Garner testified, consistent with his affidavit, that by January 6, 1991 he had reported to one of the senior officers that he had had a slight knee injury at home. Once the court's questioning was completed, furthermore, counsel chose not to explore what Mr. Garner did or did not "understand", nor did he probe any further about the issue of to whom Garner reported the home incident. Counsel failed to continue the inquiry, although the opportunity was available, into Mr. Garner's state of mind in preparing the affidavit, and the statements therein.

Additionally, counsel for Petitioner made no objection to the court's inquiry, thus, he did not preserve for appeal the issue.

In any event, if anything, the district court's inquiry merely attempted to clarify what Garner had said, or repeat that which he said, but the judge never imposed his own opinions or conclusions on the jury.

A role of the trial court is as follows:

> The trial court may actively participate and give its own impressions of the evidence or question witnesses, as an aid to the jury, so long as it does not step across the line and become an advocate for one side. Thus, we said nearly 80 years ago that a federal judge may express his or her opinion on the facts of a case so long as the judge makes it clear to the jury that they are the sole judge of those

> facts; but the judge should not become an advocate and argue the case for either side. See *Oppenheim v. United States,* 241 F. 625, 629 (1917). Because a federal trial judge is not a passive spectator or moderator, he or she retains the undoubted right to express his or her opinion of the facts to the jury; but if the court argues the case, it must argue it for both sides — the defendant's as well as the government's. See *Johnson v. United States,* 270 F. 168, 169 (2d Cir. 1920).

United States v. Filani, 74 F.3d 378 (2d Cir. 1996).

What constitutes impermissible judicial intervention, compared to appropriate inquiry, is shown in the contrast between *Filani* and the present case. While here the trial testimony lasted nine days and extends over 1200 pages of transcript, in *Filani,* the entire trial took one day. Here the Respondent's testimony consumes over 400 pages, while in *Filani,* the defendant's testimony was only 60 pages long. In *Filani,* the trial court's improper cross-examination of the defendant occurred on 25% of those pages, during which there were repeated interruptions by the trial judge who showed his bias against the defendant. By contrast, here the complained about portion of the transcript consists of four questions and one comment on one page of the transcript. This is hardly the "repeated interference with the defense case" found in *Filani* to have warranted reversal. As the Second Circuit noted, the reviewing court "must take care not to focus on isolated episodes, but to assess the trial court's inquiries in light of the record as a whole." *Filani* 74 F.3d at 386.

The district court has broad discretion to interrogate witnesses to clarify issues and aid the understanding of the jury,

even those that touch upon matters that relate to credibility. If a court's questioning is of short duration in a long trial, and the court gives a curative instruction that he had no opinion about any witness's credibility, it is totally acceptable for the court to ask questions of witnesses. *United States v. Manko*, 979 F.2d 900 (2d Cir. 1992), *cert. denied*, 509 U.S. 903, 113 S. Ct. 2993 (1993); *Berkovich v. Hicks*, 922 F.2d 1018, 1025 (2d Cir. 1991); *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1290 (2d Cir.), *cert. denied*, 498 U.S. 920, 111 S. Ct. 297 (1990).

Looked at as a whole, Petitioner here received a fair and impartial trial. If anything, furthermore, the court's inquiry was mere harmless error, and thus must be overlooked, Rule 61, Federal Rule of Civil Procedure.[3] As the Second Circuit stated in affirming the judgment, "[w]e find the judge's comments, while less than desirable, did not compromise the fairness of the trial to the defendant." (SA3a).

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3. Rule 61 states, "No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court . . . is ground for granting a new trial . . . unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

CONCLUSION

In this matter, a jury found against Petitioner and in favor of Respondent. The district court thereafter heard Petitioner's motion for a new trial, which it denied. In affirming that denial, the Court of Appeals for the Second Circuit correctly reviewed the district court's actions, and affirmed the judgment against Petitioner. Because Petitioner received a fair trial below, the petition should be denied.

Respectfully submitted,

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APPENDIX A — EXCERPTED JURY CHARGE

[Commencing at page 1178]

That's the end of Bob Hope. We will get down to business.

In the first place, I will ask the clerk to circulate among you a copy of the verdict sheet that you are going to have to answer at the end, and I will refer to it from time to time.

You might as well read it to yourselves and I will refer to it.

(Pause)

THE COURT: That gives you a general idea of what you are going to be up to. I will refer to it as we go along.

In the first place, let me remind you what I said way at the beginning with respect to the division of functions between you and me. You are supreme on the facts, and I have to deal with the law. What I think of the facts or don't think of the facts is wholly immaterial, and I don't intend to give you any impression of what I think of the facts are. Don't read into the order I say things or the way I say things any impression I may have. Because, as I told you, my theory of how the jury system works is that each of us does our own job and doesn't pay any attention to how the other one is doing his or her job.

Now, the first responsibility is finding out the facts. Your responsibility is findings out the facts. The [1179] first thing you want to do is judge the credibility of the witnesses. I don't happen to like the use of the word "credibility," because but I can't think of any other word, so I have to use it.

The reason I don't like it is it suggests if a witness is not

credible, he is lying, or she, and I have no way of knowing whether that happened in this case. Lying is sitting on the witness stand and saying something that the witness knows not to be true at the time he or she is saying it. Now, I don't have any idea whether that happened in this case or it didn't. That is something for you to judge. It just has been my experience that, usually, that doesn't happen. Usually, the witness has convinced him or herself what he or she is saying by the time they get on the witness stand, and that is to about the extent of it. That may be wrong, they may misremember things. That is for you to determine. But I will come back to that again shortly.

How do you judge the credibility? You judge credibility the way you do in your daily lives. You are always called upon to judge credibility of the people you are dealing with, that is, judge the extent that you want to rely on what they say. Do they know what they are talking about? Have they any intention to deceive you or any interest in deceiving you? When I say intent, that implies lying, and that is usually not what I think happens. Do [1180] they have any interest in deceiving you? Do they seem to know what they are talking about, and so on?

That is what you do here in the formal atmosphere of the courtroom. You have direct and cross-examination. Does the witness seem to you to be acting more or less alike on direct and cross-examination? Or when it comes to cross-examination, does he seem, he or she seem to adopt a different attitude, suggesting that he may have consciously or subconsciously be trying to deceive you. Or on cross-examination, does he or she seem to be trying to answer questions, not trying to convey impressions? That is something for you to consider.

Obviously, to what extent does the witness have an interest

in the outcome? Well, in this case just about everybody who testified had an interest in the outcome, or could be presumed or found by you to have an interest in the outcome. Certainly, the plaintiff and his wife have an obvious interest: They want to you have give them money; when they get it, they will spend it. I can't think of a better interest in the outcome. Presumably you may find the defendants — none of the defendants have, as far as we know, any pecuniary interest personal to them, but people have interests in defending people they work for and their reputation with the people they work for. All those things are for you to weigh.

[1181] Obviously, you don't just regard what an interested person tells you. If you did that in your daily life, you wouldn't listen to what anybody told you. Unless somebody is on stage or a talk show, everybody who talks to you has an interest in having you act on what they say. And over the years, you kind of develop antennae, so that you don't analyze it out all the time but you develop antennae for deciding whether a person you are talking about should be relied upon on a particular subject that he or she is talking about. Some people are completely reliable in general but aren't reliable on specific subjects.

All those kind of things you deal with everyday in your life, and, as I say, you develop kind of antennae as to how to evaluate them. The difference between ordinary life and a lawsuit and jury service is that, for jury service, you have twelve. As an individual, each one of you is deciding the case, or if I were deciding the case, all each of us would have is our own antennae. You have eight, or rather ten. You have ten, and the law says, and I believe correctly, that justice is more likely to come about if all of you pool your impressions and discuss it with each other and try to come out with a common understanding of how things are.

Appendix A

Now, there is a charge called faultus in uno. We lawyers love to use the Latin language. It means, if you [1182] are false in one thing you can be deemed to be false in everything. That means if a witness sitting on that stand has testified to something you believe he has testified falsely, and it was to an important matter, you are entitled, if you want, to disregard that witness's testimony in its entirety. Just pretend that that witness never testified. But you don't have to do that. You can say, Well, I will be on my guard, that witness told a deliberate lie on this subject, I will be on my guard, but I will judge the rest of their testimony and see where I think it goes.

But, again, it is what you do in daily life. Someone can tell you such an you outrageous lie you might say, I am never going to listen to that person again, I haven't got time. Or they may tell you an outrageous lie and you figure out what motivated that lie and decide it is not likely to be motivated again, and I will be on my lookout and listen to what that person says, and with due caution decide whether or not to rely on it or not. That is exactly the way it is here.

Then there is a general rule about prior inconsistent statements. If a witness testified to a fact and then is shown to have made a prior statement inconsistent with that fact, naturally you take into account the inconsistency in evaluating the witness's entire testimony. If you find that the inconsistency was [1183] deliberate and had a motive, then, naturally, you take that into account very seriously in considering the rest of the witness's testimony. If you decide, though, it is just a mistake or seems to the witness an unimportant matter, why then you evaluate it accordingly.

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